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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-614

D. W. SHAPS,

Petitioner,

versus

UNION COMMERCE BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioner, D. W. Shaps, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont entered in this proceeding on February 3, 1972.

OPINION BELOW

The trial court, the 162nd Judicial District Court of Dallas County, Texas, did not write an opinion. The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas is reported at 476 S.W. 2d 466, and is printed in Appendix A to this petition (pp. 1a-5a, *infra*).

JURISDICTION

The judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont was entered on February 3, 1972. A timely motion for rehearing was denied on February 24, 1972. (See Appendix C, p. 8a, *infra*) The Supreme Court of Texas denied a timely-filed application for a writ of error on May 3, 1972, and a motion for rehearing of its denial on July 26, 1972, (See Appendix D, p. 9a-10a, *infra*), and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether an Ohio judgment on a cognovit note obtained in accordance with Ohio Revised Code, Section 2323.13 as it existed on November 30, 1967, is constitutionally invalid under the due process clause of the Fourteenth Amendment because Petitioner was deprived of both notice and an opportunity to be heard prior to judgment, and an opportunity to defend the action on the note on the merits subsequent to judgment.

2. Whether a contractual waiver of constitutional rights in a civil proceeding is governed by the criminal standard that the waiver be voluntarily, intelligently, and knowingly made.

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code, Section 2323.13, as it read at the time the judgment assailed herein was entered in 1967, is set out below. This statute was subsequently amended, and the amended provisions are set out in Appendix B to this Statement.

OHIO REVISED STATUTES

Section 2323.13(11597) Warrant of attorney to confess

An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the Court before which he makes the confession, which shall be in the county where the maker resides or in the county where the maker or any one of several makers sign the warrant of attorney authorizing the confession of judgment, any agreement to the contrary notwithstanding; and the original or copy of the warrant shall be filed with the clerk.

STATEMENT OF THE CASE

The instant suit arose out of the execution by the Petitioner of a promissory note containing a cognovit clause which provided:

"The undersigned, and, if more than one, each of the undersigned, hereby authorizes any at-

> torney-at-law to appear in any court of record in the State of Ohio, or in any other state of federal district of the United States, at any time or times after the above sum becomes due, and waive the issuance and service of process and confess judgment against any one or more, or all of them, severally or jointly, in favor of any holder of this note, for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution. No judgment or judgments against less than all of the undersigned shall be a bar to a subsequent judgment or judgments against any one or more of the undersigned against whom judgment has not been obtained hereon." (See Appendix E, p. 11a-12a, *infra*.)

The note was executed on January 13, 1965, in Cleveland, Ohio, where Petitioner was an employee of The Charles Corporation. Later that year, in July, the Petitioner left the employment of The Charles Corporation and moved to Dallas County, Texas, where he has continuously resided to the present time. The principal balance of the note was $20,000.00, at an interest rate originally set at 5-1/4%. However, between the dates of February 11, 1965, and October 3, 1967, twenty-nine separate payments were made against the principal and interest owing on the note, reducing the liability to $17,716.54. None of these payments were made by the Petitioner, nor did he have any knowledge of the fact that payments had been made. In addition, the interest rate of the note was increased twice, to a final

rate of 6-3/4%, the increases occurring without the knowledge or consent of the Petitioner. Payment of the note was guaranteed by Petitioner's former employer, The Charles Corporation.

On November 30, 1967, the Respondent, as holder of the note, filed suit in the Court of Common Pleas of Cuyahoga County, Ohio, and obtained a judgment for the sum of $17,899.23, plus interest. The Petitioner was not advised of the filing of suit, or taking of judgment, all of which was accomplished within a few hours on the same date, to-wit, November 30, 1967. Judgment was taken pursuant to an Ohio statute which permitted any attorney to appear before the court, produce the warrant authorizing confession of judgment, and confess the judgment. The statute contained no provision for notice to the maker of the note, either before or after judgment. Accordingly, Petitioner's first notice of the fact that a judgment had been entered against him came in the Respondent's letter of January 8, 1968. (S. F. 53, 54, 55)[1]

The circumstances surrounding the execution of the note are important for an understanding of the issues raised by Petitioner herein. In late 1964, the Respondent was the chief banking source for the Petitioner's former employer, The Charles Corporation, and in fact had loaned The Charles Corporation in excess of $760,000.00. In the course of his employment, the Petitioner

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[1] "S. F." citations are to the Statement of Facts of proceedings before the trial court, which constituted part of the record in the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, at Beaumont, and is Document 4 of the certified record in this cause.

attended conferences between representatives of these two companies where concern was expressed by the bank that the debt structure of The Charles Corporation, as compared to the paid-in equity, was too heavy. As a result of this concern, a plan was devised whereby employees of The Charles Corporation would sign notes with the Respondent bank, the proceeds therefrom to be used to buy stock in The Charles Corporation, thus increasing the paid-in equity. The Charles Corporation would then pay some of its outstanding debt to the Respondent bank using the cash realized from the sale of the stock, and thereby reduce its debt structure.

The stock purchased with the proceeds of the loans was used to collateralize the notes signed by the several employees involved. According to the Petitioner's interpretation and understanding of the plan, it was understood by all of the parties involved that the individual employees who signed the notes had no personal liability thereon. The object of the carefully conceived transaction was to improve the balance sheet structure of The Charles Corporation without actually altering the nature of the obligations existing between it and the Respondent bank. As a consequence of this plan, Petitioner was not required to make an application for the loan; his credit was never checked, (although he was not in a position to collateralize the note); he never received the loan proceeds; and the stock purchased with the proceeds of the note was endorsed over to The Charles Corporation and left in the possession of the bank. Although The Charles Corporation was purportedly a guarantor of the note, it

actually paid the 29 payments made against the balance owing on Petitioner's note.

When Respondent filed suit in the District Court of Dallas County, Texas, in 1969, seeking to obtain recognition of the Ohio judgment pursuant to the full faith and credit provisions of the United States Constitution, the Petitioner countered with the pleas that the Ohio court had no in personam jurisdiction to render the judgment involved, and further that the facts disclosed above indicate that there was fraud in the procurement of the judgment. (Tr. 3-6)[2] Although trial was to a jury, at the close of all of the evidence the trial court granted Respondent a directed verdict, affording full faith and credit to the Ohio judgment. (Tr. 17 and 18)

Among other things, Petitioner's assignments of error before the Court of Civil Appeals urged that the Ohio judgment was obtained in violation of his Fourteenth Amendment rights, and further that the Ohio courts were without in personam jurisdiction, and accordingly the judgment was not entitled to full faith and credit.[3] The decision of the Court of Civil Appeals affirmed the judgment, mischaracterizing Petitioner's assault thereon as solely one of in personam jurisdiction, and ignoring the issue of whether the due proc-

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[2] "Tr." citations are to the Transcript of Record in the trial court, which constituted part of the record in the Court of Civil Appeals for the Ninth Supreme Judicial District of Beaumont, and is Document 1 of the certified record in this cause.

[3] These assignments of error are contained in Points of Error 1 and 4 of the Brief of Appellant, D. W. Shaps, filed in the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, constituting Document 5 in the certified record of this cause.

ess clause of the Fourteenth Amendment to the United States Constitution had been violated. (See Appendix A, p. 1a-5a, *infra*) As to the defense of fraud in the procurement of the judgment, the Court of Civil Appeals defined the fraud as intrinsic in nature and, therefore, inadmissible in the action upon the judgment. (See Appendix A, p. 3a-5a, *infra*.) Petitioner reasserted in his Motion for Rehearing to the Court of Civil Appeals his assignments of error relating to the procedural due process issues, in addition to the question of whether the Ohio court had in personam jurisdiction.[4] On February 24, 1972, the Court of Civil Appeals overruled his Motion for Rehearing without further opinion. (See Appendix C, p. 8a, *infra*.)

Petitioner again asserted his constitutional issues in the timely-filed Application for Writ of Error addressed to the Supreme Court of Texas.[5] The Supreme Court of Texas refused the Application for Writ of Error and, on July 26, 1972, overruled Petitioner's Motion for Rehearing thereon. (See Appendix D, p. 9a-10a, *infra*)

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[4]These assignments are contained in Point 1 and Point 4, Appellant's Motion for Rehearing before the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, which is Document 9 in the certified record in this cause.

[5]The assignment of error relating to the constitutional issue were contained in Points of Error 1 and 4 of the Application for Writ of Error from the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont which constituted the record in the Texas Supreme Court and is Document 11 in the certified record of this cause.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Illustrates The Continuing Judicial Controversy And Confusion Over The Applicability Of The Constitutional Concepts Of Due Process To A Cognovit Judgment.

In historical perspective, cognovit judgments have not occupied much of this Court's attention.[6] During the pendency of the instant appeal, this Court rendered its decisions in *Overmyer v. Frick*, 405 U. S. 174 (1972) and *Swarb v. Lennox*, 405 U.S. ____ (1972), thereby doubling the number of its opinions dealing with cognovit notes. The latter decisions indicate that the expanding concepts of due process are threatening to engulf cognovit provisions contained in contractual instruments, and thereby satiate the vociferous critics of the cognovit procedure. Nevertheless, the instant appeal illustrates the fact that those opinions have not quelled the raging controversy over the applicability of the constitutional guarantee of due process to a judgment obtained as a result of a cognovit clause in a contractual instrument. In fact, both decisions were ignored by the Court of Civil Appeals in the opinion rendered below, which also omitted the slightest reference to the due process claims of the Petitioner. (Appendix A, p. 1a-5a, *infra*.) The seriousness of the issue of whether summary judicial processes, such as cognovit judgments, constitute a deprivation of property

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[6]Prior to 1972, the United States Supreme Court had issued only two Opinions involving cognovit notes. *National Exchange Bank v. Wiley*, 195 U.S. 257 (1904); *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U.S. 287 (1890).

without due process of law is proven by the fact that such issue has been the subject of no less than three opinions of this Court in the past twelve months.[7]

With that background, the failure of either the Court of Civil Appeals or the Texas Supreme Court to recognize the basic constitutional issues raised herein is a glaring indication of the controversy that still lies ahead.

The controversy arises out of the lack of defined guidelines or standards that determine when due process is violated in a cognovit judgment situation. Although this Court's holding in *Overmyer* was a negative one, to the effect that cognovit judgments are not *per se* unconstitutional, that decision tacitly invites further constitutional attack on cognovit judgments where the facts involved differ from those stated in the opinion. The facts of the present appeal illustrate the purpose behind the limited applicability of *Overmyer*.

The Ohio statute which supported the judgment in this case was the predecessor in time to that which was involved in *Overmyer*. The initial statute provided only that an attorney appear and file a copy of the warrant of confession for judgment to be entered. In *Overmyer*, the statute had been amended to require that the last known address of the defendant be listed in the petition so that upon entry of judgment the Clerk of the Court could notify the Defendant of the fact that

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[7]*Overmyer v. Frick*, 405 U.S. 174; *Swarb v. Lennox*, 405 U.S. ____, 92 S.Ct. 767 (1972), *Fuentes v. Shevin*, 405 U.S. ____. See also *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

judgment was taken. *Overmyer v. Frick, supra,* 29 S. Ct. at p. 777.[8] The benefit of the statutory change between the time of this Ohio judgment and that assailed in *Overmyer,* providing for notice to the defendant of the entry of judgment against him, is seen in the fact that in the *Overmyer* case within ten days of the entry of judgment, Overmyer, through its attorney, had filed in the Ohio courts a Motion to Stay Execution of the Judgment and for a New Trial. Subsequently, a full hearing was held. No such advantage accrued to the Petitioner herein, whose first notice of the entry of judgment against him came more than thirty days after the fact, denying him such recourse. The time lapse was even more crucial for this Petitioner since he had been, at the time of the entry of judgment, a resident of the State of Texas for over two years, maintaining no contacts with the State of Ohio. One of the Overmyer corporate segments, was actually a resident of Ohio, and one of the notices of the entry of judgment mailed by the Clerk of the Ohio Court involved was sent to an Ohio address. Thus Overmyer, being within the confines of the State of Ohio, had competent as well as timely access to the Ohio court. This Petitioner had no such protection.

In the *Overmyer* situation, the cognovit note was executed in consideration for the release of mechanic's

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[8]As of September 16, 1970, the Legislature of Ohio further amended the statute to provide that any note or other contractual arrangements executed after January 1, 1971 containing a warrant of attorney for confession of judgment would be invalid unless a warning was set forth in clear and conspicuous type that by signing the document the debtor was waiving his rights to notice and court trial. (See Appendix B, *infra.*)

liens against the maker of the note, for reductions in the amount of monthly payments due under the note, for additional time in which to pay the debt, and for a reduction in interest rate, all of which was the culmination of negotiations conducted through corporate parties with the advise and consent of counsel. This Petitioner's circumstances were drastically different. He, along with several other employees, agreed to execute promissory notes, which contained a cognovit clause, with the understanding that his employer would be responsible for the balance owing. Petitioner personally received no consideration for the note; he was not given an opportunity to spend the money as he desired nor was he given the proceeds of the note. Rather, the proceeds were used to buy stock in his corporate employer which Petitioner was required to endorse over to his employer, and which was technically used to collateralize the note. The Petitioner's vigorous assertions that he never had personal liability on the note are supported by the fact that he did not make an application for the loan. No credit check was made of his personal finances (despite his testimony that he was not financially able to collateralize a loan of this magnitude); his employer made twenty-nine payments on the note; and the interest rate on the note was changed twice without his knowledge. Finally, of paramount importance is the fact that from January, 1965, when the note was executed, until October of 1967, the Respondent bank never contacted the Petitioner in any regard concerning the liability. In spite of his vigorous assault on the Ohio judgment on the grounds of fraud, the Texas courts turned deaf ears on his cause, rationalizing that such attack constituted

an intrinsic fraud and was therefore not a defense to an action on the judgment. (See *United States v. Throckmorton,* 98 U.S. 61 (1878)) Under time honored principles, no defense may be entertained which goes to the merits of the original controversy in an action upon a sister state judgment. *Milwaukee County v. White Co.,* 296 U.S. 268 (1935). Thus, unlike Overmyer's situation, this Petitioner was denied a post-judgment hearing in Ohio on the merits, and was further denied an opportunity to defend on the merits in the action at bar.

Finally, this Court in *Overmyer* concluded that cognovit notes can serve legitimate and rational business purposes and in such circumstances are not unconstitutional *per se.* Unquestionably, in that case, the cognovit provision in the second note was the consideration for the extension by the Frick Company of the financial obligations of Overmyer. In the instant situation, however, the Petitioner had no opportunity to bargain for or against the clause in the note. In fact, the Petitioner indicates that he had no opportunity whatsoever to negotiate the terms of the promissory note, since the proceeds of the note were designed to be used for a specific purpose which served no financial advantage to him. The instant situation, unlike *Overmyer,* is not a case of the Petitioner being in dire financial straits and requiring a loan of the magnitude involved herein. Nor is it a case where the maker of the note had made an individual investment decision and needed financial backing. The financial irresponsibility involved in this case is that of the Respondent bank in overextending its loan commitments to The

Charles Corporation, which subsequently undertook bankruptcy proceedings. After two years of silence the Respondent bank finally contacted Petitioner concerning his alleged liability, on the eve of the institution by The Charles Corporation of bankruptcy proceedings.[9] This delay of over two and one-half years deprived Petitioner of the opportunity to institute legal action against The Charles Corporation. Thus, not only was the Petitioner in this instance denied an opportunity to defend an action against him by Respondent on the note, either before or after entry of judgment, but, as a result of the laches of the Respondent in asserting the liability, he was also deprived of any opportunity he might have had to carry an action over against his former employer. Whereas Overmyer was able to institute a breach of contract action against Frick in a separate court, this Petitioner has been denied access to any court, on any of his defenses.

The concept of due process, requiring at a minimum that notice and opportunity for hearing appropriate to the nature of the case precede a deprivation of property, is deeply engrained in our judicial system. *Mullane v. Central Hanover Trust Company*, 339 U.S. 306 (1950), *Boddie v. Connecticut*, 401 U.S. 371 (1971). Due

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[9]The record shows that the first contact the Petitioner had directly from the respondent concerning the note was a letter forwarded to him at his home address in Texas in October 1967, demanding additional collateral for the note. The Petitioner replied, expressing his surprise and demanding a copy of the note, which apparently he did not have. In a letter of October 20, 1967, marked as Defendant's Exhibit No. 6 from the Respondent Bank, the Petitioner was advised for the first time that The Charles Corporation had filed for bankruptcy proceedings.

process encompasses even a temporary, prejudgment seizure of property, consisting of a mere possessory interest, where an opportunity for full hearing on the merits may follow. *Fuentes v. Shevin*, 405 U.S. ____, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The statutory scheme underpinning the Ohio judgment in this case goes far beyond the permissible bounds of minimum procedural due process as defined in the *Boddie* and *Fuentes* opinions. Unlike the situation in *Overmyer*, the statute here was guaranteed to deny to a defendant subjected thereto any recourse to courts, prejudgment or post-judgment, for a meaningful and fair hearing on the merits. The facts of the instant case fly in the face of the record in the *Overmyer* opinion. Nevertheless, the appellate tribunals below stood mute on the issues involved, apparently reluctant to define a violation of federal due process where existing judicial precedents have such limited relevancy or applicability.

2. The Decision Below Confuses The Standards To Be Applied In Determining Whether Constitutional Rights Have Been Waived By An Individual In A Civil Action.

The opinion of the Court of Civil Appeals below, when considered in the light of the refusal of the Texas Supreme Court to review that judgment, reflects significant confusion on the part of these appellate tribunals with reference to the appropriate standard to be applied in determining whether an individual in a civil action has waived certain constitutionally guaranteed rights. Initially, the opinion below appears to stand

mute on the issue of whether the Petitioner waived his rights to notice and hearing. Closer analysis reveals, however, that the Court of Civil Appeals actually implied a waiver, and, in so doing, used a standard less than that applied in criminal situations of a "knowing and intelligent waiver". *Overmyer v. Frick, supra; Fuentes v. Shevin, supra.*

The court below reasoned that the act of executing the note containing the cognovit provision at the time Petitioner was an Ohio resident constituted a sufficient basis to establish in personam jurisdiction of Petitioner in the Ohio court. (Opinion, Appendix A, p. 1a-5a, *infra.*) The Court was thus concluding that the Petitioner had consented to subject his person to the jurisdiction of the State of Ohio in accordance with the Ohio statute sanctioning confession procedures. The thrust of the Court's rationale is that the Petitioner had consented to waive all constitutional rights of notice and hearing by the mere execution of the contractual instrument in question.

The *Overmyer* decision, although declining to decide the standard applicable, discusses the issue of waiver in terms of the criminal test of "knowing and intelligent waiver". *Overmyer v. Frick, supra,* 92 S. Ct. at p. 782. This Court concluded that, whatever the standard to be applied, Overmyer had certainly made a knowing and intelligent waiver of its constitutional guarantees.

Subsequently, in the *Fuentes* opinion, this Court made further reference to the guidelines applicable in determining whether a waiver of constitutional

rights in a civil proceeding had occurred. Again, declining to define a standard for civil proceedings, this Court noted that "for a waiver of constitutional rights in any contest must, at the very least, be clear. The contractual language relied upon must, upon its face, amount to a waiver." *Fuentes v. Shevin, supra,* 32 L. Ed. 2nd at p. 579. Reasoning that language which provided that a seller "may take back" or "may retake or repossess" merchandise did not amount to contractual language which on its face constituted a waiver, the decision concluded that the seizure of property came in violation of due process.

From these two opinions, the only guidelines available for a judicial determination of waiver in a civil situation is that the language used in the contractual instrument must clearly set out the specific constitutional guarantees being waived. Still unresolved is the question of whether something more than clear, contractual language is required to prove a waiver.

The note involved in the instant appeal provides that an attorney at law may appear and "waive the issuance and service of process and confess judgment" and further "release all errors and waive all rights of appeal and stay of execution." (Plaintiff's Exhibit 1)[10] Under present Ohio statutes, this language would not be sufficient to support a cognovit judgment. The Ohio Legislature in 1970 added the requirement that a contractual instrument containing a cognovit provision also set forth, in clear and conspicuous type, the following caveat:

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[10]Appendix E, *infra.*

> "Warning — By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause." (See Appendix B, page 6a-7a *infra*.)

Although this legislative amendment will not aid the Petitioner in this cause, it does indicate the serious concern of the Ohio legislature for the constitutionality of the previous statutory language.

The correctness of the decision in this case is subject to question since the Texas Court implied a waiver on the basis of the language used in the note. Assuming, *arguendo*, that the contractual language involved in this appeal does, "on its face amount to a waiver", *(Fuentes v. Shevin, supra)*; the essential question is whether it was incumbent upon the Respondent to prove a "knowing and intelligent" waiver.

The Respondent herein has made no showing that this Petitioner was actually aware or made aware of the significance of the cognovit clause in the note. Coupled with the vigorous assertion by the Petitioner that he was not personally liable on the instrument he signed, and was thus not bound by it, the evidence of waiver in this record is certainly not sufficient to

meet the test applied in criminal situations of a "voluntary, knowing and intelligent waiver". The appellate tribunals below refused to concern themselves with the question of whether the Petitioner had personal liability on the note, characterizing this as a defense of intrinsic fraud. Thus, the standard applied by the courts below in determining whether the Petitioner made a waiver of constitutional guarantees clearly eliminates from consideration the issue of knowledge and intent.

By eliminating the elements of "knowing and intelligent" from the standard to determine waiver, the appellate tribunals below were forced to presume that the Petitioner intended to be bound by the cognovit provision in the contractual instrument. The test applied thus conflicts with the tenet that a court should indulge every reasonable presumption *against waiver*. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 at 393 (1937). This Court has previously declared that it will not "presume acquiescence in the loss of fundamental rights". *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292 at p. 307 (1937). Accordingly, inherent conflict will result from the application of a standard in civil situations, regarding waiver of constitutional guarantees, less than the criminal standard of knowing and intelligent waiver. Until a standard is defined which sets forth in clear and unequivocal terms the judicial guidelines governing waiver in civil situations involving individuals and their contractual relationships, considerable confusion must be expected with its concomitant litigation.

CONCLUSION

For these reasons, the Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

D. W. SHAPS,

Petitioner,

versus

UNION COMMERCE BANK,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this ____day of October, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James H. Baumgartner, Jr., Esquire, Akin, Vial, Hamilton, Koch & Tubb, 1500 Republic National Bank Tower, Dallas, Texas 75201, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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APPENDIX A

OPINION

IN THE
COURT OF CIVIL APPEALS
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT BEAUMONT

No. 7308

Appeal From The 160th District Court
Dallas County, Texas

D. W. SHAPS,

Appellant,

versus

UNION COMMERCE BANK,

Appellee.

Plaintiff, Union Commerce Bank, brought this action against defendant, D. W. Shaps, upon a judgment plaintiff obtained against defendant in the State of Ohio. Trial was by jury but at the close of all of the evidence, the trial court directed a verdict for plaintiff. The parties will be referred to here as they were in the trial court.

The first series of points of error contend the Ohio judgment was not entitled to full faith and credit by the trial court. The record in the Ohio court shows there was no service of process upon defendant and

defendant argues that the Ohio court had no in personam jurisdiction upon him to render judgment.

The evidence shows: The defendant executed a demand note payable to plaintiff in the amount of $20,000 on January 13, 1965. That defendant was residing in Ohio at the time and executed the note there. Such note contained this provision:

> "The undersigned, and, if more than one, each of the undersigned, hereby authorizes any attorney-at-law to appear in any court of record in the State of Ohio, or in any other state or federal district of the United States, at any time or times after the above sum becomes due, and waive the issuance and service of process and confess judgment against any one or more, or all of them, severally or jointly, in favor of any holder of this note, for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution."

That defendant left Ohio in July of 1965 and moved to Dallas, Texas, where he has since maintained his residence. Thereafter, plaintiff made demand upon defendant for payment of such note, which defendant failed and refused to pay. Defendant had no actual notice of the suit filed against him in Ohio and was not served with process. November 30, 1967, the suit was filed and judgment taken against defendant in the Ohio court. A certified copy of the petition filed in Ohio

shows a default by defendant in the payment of his note. A certified copy of an answer filed in the Ohio court signed by Joseph H. Mehelick as attorney for defendant in effect enters an appearance for defendant, waives service of process, and confesses judgment.

Defendant [sic] filed a motion in the Dallas court pursuant to *Rule 184a* asking the court to take judicial notice of the laws of the State of Ohio and quoting from an Ohio statute which makes provision for the confession of judgment in that state.

The Dallas court found in its judgment that the Ohio judgment was regular on its face in all respects; that it was obtained in its entirety pursuant to the laws of the State of Ohio as they existed on the date of such judgment; and that the Ohio judgment was entitled to full faith and credit in the State of Texas under Art. 4, § 1 of the Constitution of the United States of America.

We have been satisfied that the law of the State of Ohio provides for judgment by confession as we have in the case before us. *Ohio Civil Statutes, Art. 2323.13 (11597). Bulkley v. Greene*, 98 O.S. 55, 120 N.E. 216. *Swisher v. Orrison Cigar Co.*, 122 O.S. 195, 171 NE 92. Defendant has cited us no authority to the contrary.

There is a long line of authority in Texas that even though Texas does not permit a judgment to be obtained by confession (as in the case before us), a judgment by confession obtained upon a judgment note in

a foreign state recognizing such procedure will be given full faith and credit in Texas under Art. 4, § 1 of the United States Constitution. *Scott Paper Company v. Johnson*, 406 S.W.2d 548 (Tex.Civ.App., Waco, 1966, no writ); *Hastings v. Bushong*, 252 S.W. 246 (Tex.Civ. App., San Antonio, 1923, error dism.), 39 A.L.R.2d 1232-1260; *Baumgardner v. Southern Pac. Co.*, 177 S.W.2d 317 (Tex.Civ.App., El Paso, 1943, no writ); *Bernard Gloeckler Co. v. Baker Co.*, 52 S.W.2d 912 (Tex.Civ. App., El Paso, 1932, no writ).

Defendant also contends his pleadings and the evidence raise a question of fact for the jury to have determined as to his defense of fraud in the procurement of the Ohio judgment. Defendant admitted that he executed the note in question which contained the confession of judgment clause. He also admitted the proceeds of the loan obtained from plaintiff were used to purchase one thousand shares of stock in the Charles Corporation which was his employer at the time. The scheme, which he labels as fraud, is that he was one of many employees of the Charles Corporation entering into a plan to buy such stock so the money borrowed by the employees would be used to adjust the debt structure of Charles Corporation with plaintiff. That a bookkeeping entry was made to reduce the corporation obligation to plaintiff and increase the capital stock of such corporation.

We have concluded this plan, even if established as a matter of law to be fraud, would be intrinsic fraud and not extrinsic fraud or fraud in procurement.

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The defense interposed in the court below was a collateral attack under the decisions. *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940); *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488 (1947). It is likewise clear that in a suit upon such judgment, no defense may be set up which goes to the merits of the original controversy. *Milwaukee County v. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935).

There is no showing that the alleged fraud was extrinsic; and, as a matter of fact, it is clear that if there was any fraud, it was intrinsic in nature. Fraud must be extrinsic to constitute any defense to the action upon the judgment. *Crouch v. McGaw*, 134 Tex. 633, 138 S.W.2d 94 (1940); *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878). See also *Midessa Television Co. v. Motion Pictures for Television*, (5th Cir. 1961) 290 F.2d 203, cert. den., 368 U.S. 827, 82 S.Ct. 47, 7 L.Ed.2d 30 (1961). Jurisdiction was not obtained over the defendant by fraud as shown by the circumstances outlined above.

AFFIRMED.

Homer E. Stephenson
Associate Justice

Opinion delivered
February 3, 1972

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APPENDIX B

OHIO REVISED CIVIL STATUTES

Section 2323.13 — Warrant of attorney to Confess; Warning Required.

* * * *

(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession. Notwithstanding any agreement to the contrary, if the maker or any of several makers resides within the territorial jurisdiction of a municipal court established under section 1901.01 of the Revised Code, or signed the warrant of attorney authorizing confession of judgment in such territory, judgment on such warrant of attorney shall be confessed in the municipal court having jurisdiction in such territory, provided the court has jurisdiction over the subject matter; otherwise, judgment may be confessed in any court in the county where the maker or any of several makers resides or signed the warrant of attorney. The original or a copy of the warrant shall be filed with the clerk.

(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified letter mailed to him at the address set forth in the petition.

(D) A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness executed on or after January 1, 1971, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:

"Warning — By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause."

(1970 S 85, eff. 9-16-70. 132 v H 614; 128 v 137)

2323.13 former GC 11597

APPENDIX C

JUDGMENT

Court of Civil Appeals
For The Ninth Supreme Judicial District of Texas
at Beaumont

Judgment Rendered February 3, 1972

D. W. Shaps
versus
Union Commerce Bank

No. 7308

from District Court of Dalla County.

Opinion by Associate Justice Homer E. Stephenson

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellant, D. W. Shaps, and the sureties on his appeal bond, Harold B. Berman and Jay S. Fichtner, pay all costs in this behalf expended; and this decision be certified below for observance.

Order, made February 24, 1972 overruling motion for a rehearing Cause No. 7308; D. W. Shaps vs. Union Commerce Bank from Dallas County; motion for rehearing; the motion is overruled.

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APPENDIX D

JUDGMENT

Supreme Court of Texas

No. B-3296 May 3, 1972

From Dallas County, Ninth District.

D. W. Shaps
versus
Union Commerce Bank

Application of petitioner for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, D. W. Shaps and sureties, Harold B. Berman and Jay S. Fichtner, pay all costs incurred on this application.

No. B-3296 July 26, 1972

From Dallas County, Ninth District.

D. W. Shaps
versus
Union Commerce Bank

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is or-

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dered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 28th day of July, 1972.

GARSON R. JACKSON, Clerk
(Mrs.) Jewell F. Seeliger, Deputy

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APPENDIX E

COGNOVIT NOTE

Cuyahoga 1/30/68

CLEVELAND, OHIO, January 11, 19 68 $ 20,000.00

ON DEMAND ..... DAYS AFTER DATE, THE UNDERSIGNED JOINTLY AND SEVERALLY, IF MORE THAN ONE, PROMISES TO PAY TO THE ORDER OF

UNION COMMERCE BANK

.....TWENTY THOUSAND AND 00/100..... DOLLARS

at its office in the City of Cleveland, Ohio, with interest after date at the rate of 8% per annum payable Quarterly

and after maturity at the rate of eight per cent (8%) per annum, and has deposited with said lender pledges to said Bank as security for the payment of this and any and every other indebtedness of the undersigned to said Bank, whether joint or several, absolute or contingent, due or to become due, and whether hereinafter or heretofore contracted or created, and to whatsoever evidenced, discounted by or existing in said Bank, whether before or after maturity and whether the same be now or shall be participated, or shall in part, be subject to any assignment or otherwise sold hereinafter called "Obligations", on which pledges

I/WE give The Charles Corporation

The undersigned agrees to deliver to the holder additional collateral should the holder deem itself insecure.

At the option of the holder, all Obligations shall become immediately due and payable without notice or demand upon the occurrence of any of the following events of default: (a) failure of the undersigned, their or any of them to pay when due any obligation or indebtedness or perform any agreement on [illegible] (b) default in any of the covenants, conditions, [illegible] (c) the death, [illegible] (d) failure to pay when due any indebtedness owing by any of the undersigned hereunder; (e) levy, execution, attachment of creditors, assignment for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any maker, endorser or guarantor hereof, [illegible] (f) the occurrence of any such event of default, and in any case thereafter, the holder shall have the remedies of a secured party under the Uniform Commercial Code [illegible] to foreclose or dispose of the collateral hereunder at public or private sale or in one or more parcels at the discretion of the holder, and the undersigned severally waive all notices of any such disposition and all other rights and remedies of debtors, and agree to pay all reasonable attorneys' fees and all expenses incurred by the holder in connection with the collection of this note and the enforcement of its rights hereunder. The undersigned severally authorize the holder to sell any or all of the collateral at public or private sale or at any broker's board or on any securities exchange, at the option of the holder, and it is not necessary that the collateral or any part thereof be present at the place of such sale. The undersigned severally waive demand, notice or advertisement of such sale and payment of the purchase price in cash or its equivalent promptly upon delivery of the collateral, and the undersigned severally hereby agree that if any part of the collateral is sold on credit or for future delivery the holder shall not incur any liability in case the purchaser fails to take up and pay for the collateral so sold and, in case of any such failure, such collateral may be resold. The undersigned severally shall be and remain jointly and severally liable for any deficiency upon any disposition of the collateral, and the undersigned severally hereby waive all rights of redemption, stay or appraisal which they now have or may at any time hereafter have under any rule of law or statute now existing or hereafter enacted. The undersigned severally agree that the holder may accept collateral in addition to that described herein and may release any collateral without notice to the undersigned severally and without affecting the undersigned's liability hereunder. The holder shall not be bound to take any steps whatsoever to preserve any rights against prior parties, or to protect the collateral, or to give notice of any sale or other disposition thereof to any person.

Any deposits or other sums at any time credited by or due from the holder to any maker, endorser or guarantor hereof and any securities or other property of any maker, endorser or guarantor hereof at any time in the possession of the holder may at all times be held and treated as collateral security for the payment of the Obligations. The holder may apply or set off such deposits or other sums against said Obligations at any time or times, but shall not be required to do so. Any and all rights to require marshalling of assets by the holder are hereby waived.

The holder may at its option, whether or not the whole of the Obligations are then due, demand, sue for, collect, or make any compromise or settlement it deems desirable with reference to collateral held hereunder. The holder shall not be bound to take any steps whatsoever to preserve any rights against prior parties, or to protect the collateral, or to give notice of any sale or other disposition thereof to any person.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this note. A waiver on any one occasion shall not be construed as a bar to or waiver of any such right on any future occasion.

[illegible] and agreements of this note, or the obligations represented hereby, matures [illegible] demand, [illegible] protest, and all other demands and notices in connection with the delivery, acceptance, performance, default or enforcement of this note, consents to any extension of time (at any one or more times) of payment of any other obligations, to any substitution, exchange or release of collateral, whether in the addition or release of any [illegible]

The undersigned, and, if more than one, each of the undersigned, hereby authorizes any attorney-at-law or agent to any court of record in the State of Ohio or in any other state or United States of the United States, or any [illegible] to appear for and confess judgment against the undersigned [illegible] in favor of the holder, as of [illegible] for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution. The undersigned severally hereby waive the benefit of all [illegible] and agree that a true copy of this note shall be filed in any [illegible] judgment or judgments against any one or more of the undersigned.

As herein used the word "holder" shall mean the payee or other endorsee of this note, who is in possession of it, or the bearer hereof, if this note is at the time payable to the bearer.

ADDRESS 2019 Fulton Rd. SIGNED D. V. Shapiro

Cleveland 13, Ohio

Send all notices to: % The Charles Corp.
19701 So. Miles Ave.
Warrensville Hts., Ohio

No. 70020

Due Demand

FORM NO. 52, CB REV. 1-1-63

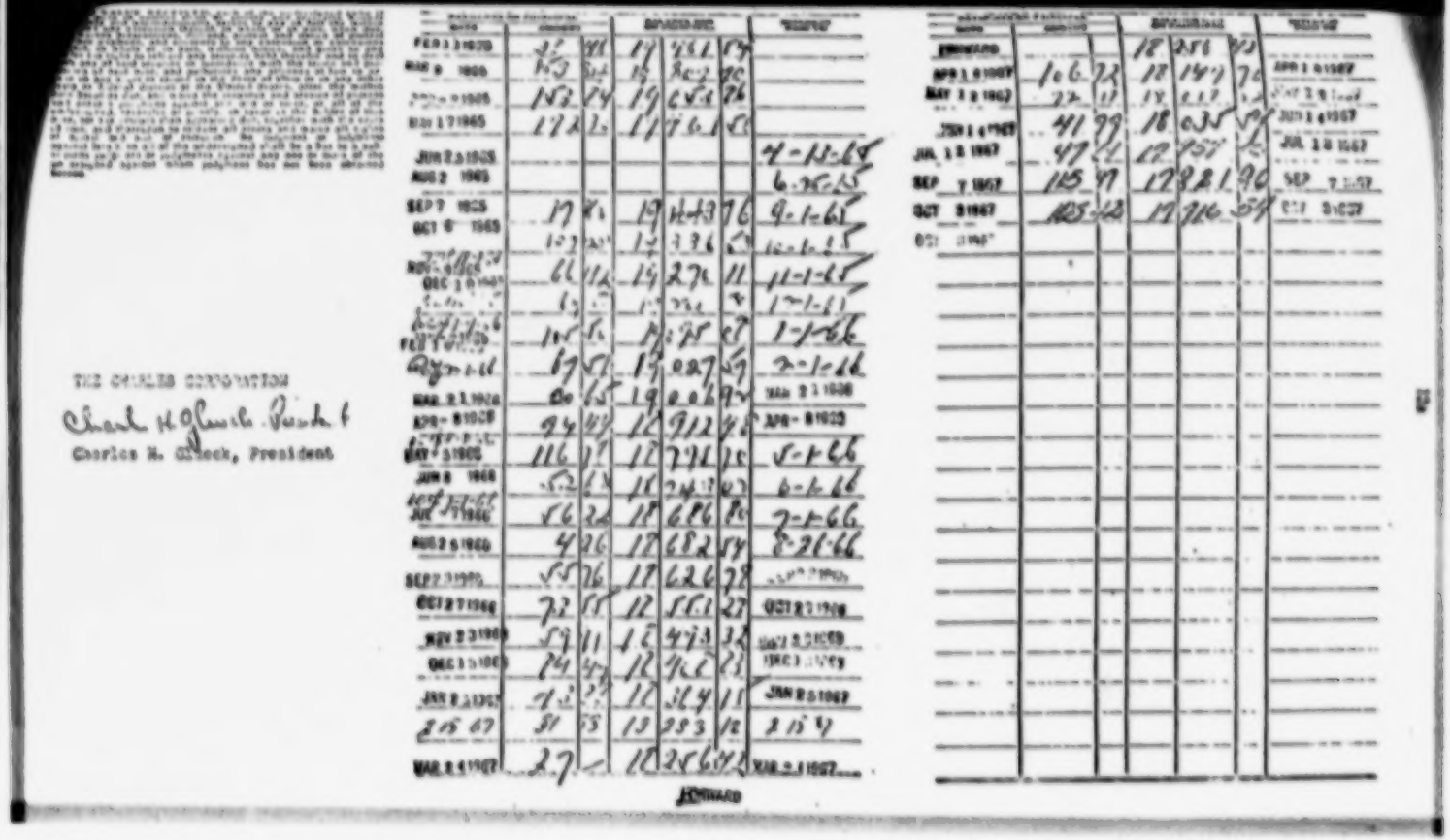
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THE CHARLES CORPORATION

Charles H. Glueck, President

POOR COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-614

D. W. SHAPS,

Petitioner,

versus

UNION COMMERCE BANK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-614

D. W. SHAPS,

Petitioner,

versus

UNION COMMERCE BANK,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Civil Appeals for the
Ninth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, UNION COMMERCE BANK, respectfully files this its Brief in Opposition to the Petition for Writ of Certiorari, and prays that said petition be denied because, as shall hereinafter be shown, there exists neither reason nor jurisdiction to grant said writ.

OPINIONS BELOW

While Petitioner is correct in stating that the trial court, the 162nd Judicial District Court of Dallas County, Texas, did not write an opinion; nevertheless, that court did recite important findings of fact and conclusions of law in its judgment. Accordingly, the trial court's judgment is printed in the Appendix to this brief in opposition. The opinion of the Texas Court of Civil Appeals at Beaumont is printed in Appendix A to the petition.

CONTEST TO JURISDICTION

Although at first blush it may appear that this Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1257(3) (1970), limitations upon the grant of judicial power of Article III of the United States Constitution recognized by this Court dictate that the petition be dismissed for lack of jurisdiction because: (1) the decision of the Supreme Court of Texas in denying the application for writ of error was based on adequate nonfederal bases; and/or (2) the federal question was never properly raised in the Supreme Court of Texas.

This Court has consistently declined to review state court judgments based upon adequate nonfederal grounds. *See, e.g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875).

When the nonfederal, or state, ground is based on a rule of procedure rather than substantive law, the rule must serve a legitimate state interest. *See Henry v. Mississippi*, 379 U.S. 443 (1965). Also, this Court requires that the federal question actually be raised in the state court preceedings in order to justify jurisdiction under 28 U.S.C. § 1257(3) (1970). *See Street v. New York*, 394 U.S. 576, 581-85 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *R. Stern & E. Gressman, Supreme Court Practice* 116-31 (4th ed. 1969). These two jurisdictional limitations dovetail when the nonfederal ground is a state rule of procedure, which in turn has prevented the petitioner from urging or obtaining a ruling on his constitutional arguments. In such a situation this Court has stated that "it is not entirely clear whether . . . the scope of our review is limited to determining whether the state court has 'bypassed the federal right under forms of local procedure or whether we should decide the matter '*de novo* for ourselves.'" *Ellis v. Dixon*, 349 U.S. 458, 463 (1955).

Under either or both of the above standards it is clear that this Court has no jurisdiction to review this case. Petitioner never raised a constitutional defense of any kind at the trial of this cause (Tr. 3-6).[1] Texas Rule of Civil Procedure 94 requires that such a defense be affiirmatively pled in an answer at trial. *See State v. Scott*, 460 S.W.2d 103 (Tex. 1970), *cert. denied*, 402 U.S. 1012 (1971) (constitutional defense is an affirmative defense). Petitioner did not assert a constitutional basis for his motion for a directed verdict, nor did he present a constitutional objection to Respondent's motion for directed verdict

[1] "Tr." citations are to the Transcript of Record in the trial court, which constituted part of the record in the Texas Court of Civil Appeals at Beaumont, and is Document 1 of the certified record in this cause.

(which was granted). Petitioner, on appeal to the Texas Court of Civil Appeals at Beaumont, for the first time raised a constitutional defense to the trial court's judgment. Petitioner there alleged that the Ohio confession of judgment statute, Ohio Revised Code § 2323.13 (1954) (amended 1970), was per se violative of the fourteenth amendment to the United States Constitution because it provided no opportunity to be heard prior to judgment.[2] Respondent at that time noted that the court of civil appeals was precluded from dealing with the issue because of Petitioner's failure to plead or otherwise present such a defense at trial.[3] The Texas Court of Civil Appeals refused to entertain Petitioner's constitutional argument, as is evidenced by the absence of any reference to such argument in that court's opinion or its overruling of Petitioner's motion for rehearing.

In Petitioner's application to the Texas Supreme Court for a writ of error, Petitioner, for the first time, raised the argument that he did not knowingly and intelligently waive his rights to notice under the fourteenth amendment.[4] Because this alleged error was not included in Petitioner's points of error on appeal in the Texas Court of Civil Appeals at Beaumont, Respondent noted in its contest to the application for a writ of error[5] that consideration of the argument by the Texas Supreme Court was precluded by Texas Rule of Civil Procedure 469 (c). Like the court of civil appeals, the Texas Supreme Court refused

[2] Brief of Appellant, point of error 4; Document 5 in the certified record of this cause.

[3] Brief of Appellee at 12-13; Document 6 in the certified record of this cause.

[4] Application for Writ of Error, point of error 1; Document 11 in the certified record of this cause.

[5] Contest to Application for Writ of Error at 9-11; Document 12 of the certified record in this cause.

to consider this or any other improperly raised defensive issue of Petitioner, as is evidenced by its refusal to grant the writ of error and its overruling of Petitioner's motion for rehearing.

Clearly the cited Texas rules of civil procedure requiring the timely raising of affirmative defenses at trial and/or points of error on appeal serve a legitimate state interest in avoiding prejudice to parties, delay, and waste of judicial resources. Therefore, under the standard of *Henry v. Mississippi*, 379 U.S. 443 (1965), any refusal of the Texas courts to consider Petitioner's allegations of constitutional error would be based upon an adequate state ground, thus precluding this Court from taking jurisdiction of this case.

Petitioner has the burden of showing affirmatively that this Court has jurisdiction. *Gorman v. Washington Univ.*, 316 U.S. 98 (1942). When, as here, the highest state court has failed to pass upon a federal question, it has been held that "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 580, 582 (1969). *See Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Chicago, I & L.L.R.R. v. McGuire*, 196 U.S. 128, 131-33 (1905). Further, at best Petitioner can argue only that the reason for the Texas Supreme Court's refusal to grant his writ of error is unclear. In such a situation Petitioner is deemed not to have sustained his burden of establishing this Court's jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541 (1952); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). Similarly, in *Ellis v. Dixon*, 349 U.S. 548 (1955), this Court declined jurisdiction of a petition for writ of certiorari to a New York intermediate appellate court, when it

determined the New York Court of Appeals "might" have denied leave to appeal on the basis of a nonfederal ground (insufficiency of pleading).

Therefore, under whatever standard applicable, it is obvious that Petitioner has not and cannot affirmatively demonstrate that this Court has jurisdiction of this case. Any decision that this Court might render on Petitioner's waiver questions would simply be an advisory opinion, because on remand Texas courts would still be free to insist upon compliance with the requirements of the Texas Rules of Civil Procedure with respect to timely presentation of affirmative defenses, and affirm the trial court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Full Faith and Credit Clause of the United States Constition and its implementation provision with respect to judicial proceedings are set forth below:

> SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[5]
>
> § 1738. State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts

[5] U. S. CONST. art. IV, § 1.

within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[7]

2. The Ohio cognovit judgment statute, as it existed on the date Respondent obtained its Ohio judgment, is set forth below:

Section 2323.13 (11597) Warrant of attorney to confess

An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the Court before which he makes the confession, which shall be in the county where the maker resides or in the county where the maker or any one of several makers sign the warrant of attorney authorizing the confession of judgment, any agreement to the contrary notwithstanding; and the original or copy of the warrant shall be filed with the clerk.[8]

3. The Ohio statutes setting forth the grounds and procedures by which judgments might be set aside, as they existed at all times pertinent hereto, are as follows:

§ 2325.01 Final order, judgment, or decree of court of common pleas or court of appeals may be vacated or modified. (GC § 11631)

The court of common pleas or the court of appeals may vacate or modify its own final order, judgment, or decree after the term at which it was made:

---

[7] 28 U.S.C. § 1738 (1970).

[8] Ohio Rev. Code Ann. § 2323.13 (1954) (amended 1970).

(A) By granting a new trial of the cause, within the time and in the manner provided in sections 2321.19 [2321.21) of the Revised Code;

(B) By a new trial granted in proceedings against defendants constructively summoned as provided in section 2703.18 of the Revised Code;

(C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order;

(D) For fraud practiced by the successful party in obtaining a judgment or order;

(E) For erroneous proceedings against an infant or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(F) For the death of one of the parties before the judgment in the action;

(G) For unavoidable casualty or misfortune, preventing the party from prosecuting or defending;

(H) For errors in a judgment, shown by an infant within twelve months after arriving at full age as prescribed in section 2323.21 of the Revised Code;

(I) For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment;

(J) When such judgment or order was obtained in whole or in a material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted.[9]

§ 2325.10 Limitation on such relief. (GC § 11640)

Proceedings to vacate or modify a judgment or order for the causes mentioned in divisions (D), (E), and (G) of section 2325.01 of the Revised Code must be commenced within two years after the judgment was rendered, or order made. Proceedings for the causes mentioned in divsions (C) and (F) of such section,

[9] *Id.* § 2325.01.

must be commenced within three years, and in division (I) of such section, within two years after the defendant has notice of the judgment. Under division (J) of such section, the proceedings may be commenced after the guilty party is convicted, if the conviction is within two years from the rendition of the judgment.[10]

4. The following Texas Rules of Civil Procedure require that defenses and points of appeal be properly raised and preserved.

Rule 94. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

Rule 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in

[10] *Id.* § 2325.10.

cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary.

Rule 469. Requisites of Application [for writ of error] . . . .

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

STATEMENT OF THE CASE

Petitioner's statement of the case contains few record references and fails to set forth the true nature of the case; consequently, Respondent presents its own statement.

Respondent brought suit against Petitioner in the 162nd Judicial District Court of Dallas County, Texas, on a foreign judgment obtained by Respondent against Petitioner in Cuyahoga County, Ohio, on November 30, 1967, in the total sum of $17,899.23, with interest at the rate of eight (8%) percent per annum from the date of the entry of said judgment (Tr.

7-16; S.F. Plf. Exh. 2).[11] Although Petitioner and his counsel received actual notification that judgment had been taken against him within forty-five (45) days after its rendition (S.F. 13; Df. Exh. 1), Petitioner, while represented by counsel (S.F. 14; Df. Exh. 1), made no attempt to cause said judgment to be vacated in Ohio pursuant to Ohio Revised Code sections 2325.01(I) and 2325.10.[12]

In support of its suit on the foreign judgment, on August 7, 1970, Respondent filed a motion, pursuant to Texas Rule of Civil Procedure 184a, requesting the District Court to take judicial notice of the common law, public statutes, and court decisions of the State of Ohio as such existed on the date of the judgment (Supp. Tr. 4-6),[13] which notice the District Court did take (Tr. 17-19). Petitioner proceeded to trial on the merits of this cause based upon the allegations contained in his First Amended Answer, which alleges no constitutional defense whatsoever (Tr. 3-6).

At the trial Respondent introduced and had accepted without objection an exemplified copy of the foreign judgment obtained in Cuyahoga County, Ohio, (S.F. 15-16; Plf. Exh. 2) which complied in all respects with the requirements of 28 U.S.C. § 1738 (1970) (State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit). Under the substantive

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[11] "S.F." citations are to the Statement of Facts of proceedings before the trial court, which constituted part of the record in the Texas Court of Civil Appeals at Beaumont, and is Document 4 of the certified record in this cause. "Plf. Exh." or "Df. Exh." citations are to the exhibits used at trial, which are appended to the Statement of Facts described above.

[12] OHIO REV. CODE ANN. §§ 2325.01(I), 2325.10 (1954).

[13] "Supp. Tr." citations are to the Supplemental Transcript of Record, which constituted part of the record in the Texas Court of Civil Appeals at Beaumont, and is Document 2 of the certified record in this cause.

law of the State of Texas and the United States of America, absent affirmative proof that the rendering court had no jurisdiction, or that the judgment was fraudulently obtained, the exemplified copy of the foreign judgment as admitted in evidence was entitled to full faith and credit.

Petitioner tendered no evidence to controvert or attack the validity of the foreign judgment as entered under the laws of the State of Ohio, and Petitioner made no attempt whatsoever to tender any evidence that Petitioner did not understand the terms and conditions of the cognovit note, which he executed on January 13, 1965, in Cleveland, Cuyahoga County, Ohio (S.F. 1-76; Plf. Exh. 1). Rather, Petitioner attempted to affirmatively demonstrate that the Ohio judgment was obtained by "extrinsic" fraud and, therefore, not entitled to full faith and credit.

The trial was before a jury. At the conclusion of all testimony and evidence in chief, and after Respondent and Petitioner had rested and closed, upon a motion made by Respondent's attorney, the cause was withdrawn from the jury and judgment entered for the Respondent in the total sum of $22,837.93, plus interest at the rate of eight (8%) percent per annum from the date of the judgment until paid (S.F. 83-85; Tr. 17-19). From the directed verdict granted by the trial court, Petitioner prosecuted an appeal to the Texas Court of Civil Appeals at Beaumont.

As previously stated, Petitioner pled an affirmative defense at the trial of this cause that the Ohio court had no in personam jurisdiction over the Petitioner. However, Petitioner failed to introduce any evidence whatsoever to the effect that under the laws of the State of Ohio the Ohio court did not have in personam

jurisdiction over the Petitioner. Instead, Petitioner defended during the trial of this cause on the sole basis that the foreign judgment obtained in Ohio was obtained by "extrinsic" fraud (Tr. 3-6; S.F. 1-76, 78-83). Petitioner at no time pled or attempted to introduce a trial amendment to his pleadings alleging a constitutional defense during the trial of this cause; Petitioner did not raise a constitutional issue regarding his fourteenth amendment rights during the trial of this cause; and in Petitioner's motion for a directed verdict, which was overruled, Petitioner set forth no constitutional basis for the assertion of said motion (Tr. 3-6; S.F. 1-76; S.F. 78-83).

However, before the Texas Court of Civil Appeals at Beaumont Petitioner attempted to assert for the first time that the use of a cognovit note per se violated his fourteenth amendment right to due process.[14] The Texas Court of Civil Appeals at Beaumont determined that the law of the State of Ohio did provide for judgment upon a cognovit note, citing Ohio statutes and case authority. The court noted that the Petitioner failed to cite any authority to the contrary; and pursuant to a long line of substantive authority in the State of Texas determined that even though Texas did not permit a judgment to be obtained upon a cognovit note, a judgment upon a cognovit note obtained in a foreign state recognizing such procedure will be given full faith and credit in the State of Texas under Article IV, Section 1 of the Constitution of the United States. The court further found that as a matter of law the fraud as alleged by Petitioner was intrinsic in nature, and not extrinsic fraud which is necessary to constitute a defense to any action upon a judgment under the

[14] Brief of Appellant, point of error 4; Document 5 in the certified record of this cause.

substantative law of the State of Texas and of the United States. The Texas Court of Civil Appeals then affirmed the judgment of the trial court.

After filing a motion for rehearing in the Court of Civil Appeals at Beaumont, which was ultimately overruled,[15] Petitioner then continued his appeal by filing an application for writ of error addressed to the Supreme Court of Texas, and again he attempted to allege a new point of error.[16] Without opinion the Texas Supreme Court refused Petitioner's application for writ of error with the notation "no reversible error," and after Petitioner's motion for rehearing on his application for writ of error to the Texas Supreme Court was denied, Petitioner perfected his application for writ of certiorari which is presently before this Court.

ARGUMENT

1. This case involves no important question of Federal Law.

The first question allegedly presented by this case is:

> Whether an Ohio judgment on a cognovit note obtained in accordance with Ohio Revised Code, Section 2323.13 as it existed on November 30, 1967, is constitutionally invalid under the due process clause of the Fourteenth Amendment because Petitioner was deprived of both notice and an opportunity to be heard prior to judgment, and an opportunity to defend the action on the note on the merits subsequent to judgment.[17]

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[15] Motion for Rehearing of Appellant, point of error 4; Document 9 in the certified record of this cause.

[16] Application for Writ of Error, point of error 1; Document 11 in the certified record of this cause.

[17] Petition for Writ of Certiorari, Shaps v. Union Commerce Bank, No. 72-614, at 2.

This precise question has already been decided in the negative by this Court in *Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *Osmond v. Spence*, 405 U.S. 971 (1972), vacating *and remanding* 327 F. Supp. 1349 (D. Del. 1971). Even though it may be doubtful state policy to allow one an opportunity to defend on the merits subsequent to a judgment, Ohio has done just that; and Petitioner has no one to blame but himself for his failure to avail himself of such a generous procedure. Pursuant to Ohio Revised Code sections 2325.01(I), 2325.10[10] and applicable case law, Petitioner could have caused the Ohio judgment to be vacated (within two years from notice of entry) upon any allegation of a jury question on the merits or otherwise. *See Livingstone v. Rebman*, 169 Ohio St. 109, 158 N.E.2d 366 (1959).

In light of the foregoing, Respondent respectfully submits that to the extent that Petitioner's first question refers to a deprivation of "both notice and opportunity to be heard prior to judgment," *Overmyer* has already disposed of the constitutional issue. With respect to that portion of Petitioner's first question referring to the additional deprivation of "an opportunity to defend the action on the note on the merits subsequent to judgment," such an opportunity did exist under the above-cited Ohio law, and Petitioner, represented by counsel (S.F. 14; Df. Exh. 1), did not take advantage of it.

2. The Decision Below is Clearly Correct.

Respondent respectfully submits that Petitioner must be deemed as a matter of law, under any applicable standard,

[10] Ohio Rev. Code Ann. §§ 2325.01(I), 2325.10 (1954). *See* pp. 6-8 *supra*.

to have waived his rights to issuance of citation, service of process, or an opportunity to be heard prior to judgment at one, all, or any combination of the following occasions: (a) at the time Petitioner executed the cognovit note in question; (b) after notification of the entry of judgment, when Petitioner failed to exercise his right to cause said judgment to be vacated under applicable Ohio law; (c) at the trial of this cause; and (d) on appeal of this case.

(a) *At the Time Petitioner Executed the Cognovit Note in Question:* Petitioner testified that he obtained a Masters of Business Administration degree from Harvard Business School in 1950 (S.F. 45), and that at the time Petitioner executed the cognovit note in question he was the Administrative Vice President of The Charles Corporation responsible for *all* the financial aspects of The Charles Corporation (S.F. 7, 6). Petitioner further testified that as the Administrative Vice President in charge of all the financial aspects of The Charles Corporation, Petitioner was privy to several meetings between the President of The Charles Corporation and one of Respondent's officers, wherein the financial status of The Charles Corporation was discussed (S.F. 23-24).

In attempting to support the allegations contained in his pleadings that the Ohio judgment was obtained by fraud (Tr. 3-6), Petitioner testified in essence that pursuant to a financial scheme and plan, various officers and employees of The Charles Corporation, including the Petitioner herein, would borrow money from Respondent upon the execution of a cognovit note guaranteed by The Charles Corporation; the officers and employees would purchase common stock of The Charles Corporation; the officers and employees would then pledge the shares

of common stock purchased from The Charles Corporation to Respondent as collateral for their notes held by Respondent; and The Charles Corporation would take the monies received from the sale of the stock to its officers and employees and pay off debts of The Charles Corporation owed to Respondent (S.F. 19, 23-26, 30). Additionally, Petitioner testified that at the time he executed the cognovit note in question, he personally was aware of the distinction and the effect of the distinction between a corporate signature and a personal signature (S.F. 46).

Petitioner further testified that when he left the employ of The Charles Corporation, he entered into an indemnity agreement with The Charles Corporation under which he assigned all his right, title, and interest in the shares of The Charles Corporation owned by him and held by Respondent as collateral for the indebtedness evidenced by the cognovit note in question, in consideration of The Charles Corporation's agreement to indemnify Petitioner against liability upon the cognovit note that Respondent ultimately sued upon and obtained judgment in Ohio (S.F. 33-35, 48; Df. Exh. 5). However, Petitioner readily acknowledged he did not enter into any agreement with Respondent with regard to his liability on the cognovit note executed by Petitioner and payable to Respondent (S.F. 49-50).

Respondent respectfully submits that based upon Petitioner's own testimony during the trial of this cause, Petitioner clearly, and unequivocally demonstrated not only the existence of an outstanding educational background, but also his adeptness in making use of promissory notes to effectuate a most sophisticated transaction. In addition to his obvious business stature, Petitioner most definitely established that at the time he resigned

from The Charles Corporation in July 1965, he was acutely aware of his personal liability on the cognovit note in question, and as a consequence entered into an agreement with The Charles Corporation whereby The Charles Corporation was to indemnify Petitioner against any liability upon the cognovit note. Based upon the foregoing, Respondent submits that given Petitioner's educational background, his business knowledge and responsibilities, and his familiarity with the transaction surrounding the execution of the cognovit note in question, under any applicable standard, Petitioner by the execution of the cognovit note waived his fourteenth amendment right to receive issuance of citation, service of process, and an opportunity to be heard prior to entry of the judgment upon the cognovit note.

Petitioner received consideration of $20,000.00 for his execution of the cognovit note in question, and he was an active party and participant in the alleged corporate scheme to restructure the debt-equity position of his employer, The Charles Corporation. There is no evidence or any testimony whatsoever that Petitioner was in any manner coerced or otherwise pressured to execute the cognovit note in question. To the contrary, Petitioner wanted to "help" his employer, and had the stock appreciated in value, Petitioner would have received the benefit of that appreciation (S.F. 51).

(*b*) *After Notification of the Entry of Judgment, When Petitioner Failed to Exercise his Right to Cause said Judgment to be Vacated under Applicable Ohio Law*: Respondent obtained judgment against Petitioner pursuant to the cognovit provisions of the promissory note on November 30, 1967, and within forty-five days of the rendition of said judgment Petitioner and his

counsel received actual notice that judgment had been taken against him (S.F. 13; Df. Exh. 1). Even though Petitioner was entitled under Ohio law [19] to cause said judgment to be vacated within two years from notice of entry of the judgment, upon the mere showing of a jury question, Petitioner did nothing. *See Livingstone v. Rebman*, 169 Ohio St. 109, 158 N.E. 2d 366 (1959). The Texas action for enforcement of the Ohio judgment was initiated May 6, 1969, and from such date Petitioner still had in excess of eight months to avail himself of the procedures of Ohio law pertaining to the setting aside of cognovit judgments.

Thus, by his failure to actively assert the rights afforded him under Ohio law at the time of the trial of this cause on April 27, 1971, (Tr. 17-19) Petitioner had placed himself in an untenable position. Under Article IV, Section 1 of the United States Constitution,[20] and the federal statute effectuating the full faith and credit requirements set forth in the Constitution,[21] Petitioner could successfully defend the suit on the foreign judgment only by affirmatively proving the rendering court had no jurisdiction, or by affirmatively demonstrating that the foreign judgment was obtained by fraud.[22] In essence, the knowledgeable failure of Petitioner while represented by counsel (S.F. 14; Df. Exh. 1) to exhaust the remedies available in Ohio to vacate the foreign judgment, precluded Petitioner from asserting a defense before the Texas courts predicated upon the premise that Petitioner did not "knowingly and/or intelligently"

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[19] OHIO REV. CODE ANN. §§ 2325.01(I), 2325.10 (1954). *See* pp. 6-8 *supra*.

[20] U.S. CONST. art. IV, § 1. *See* p. 5 *supra*.

[21] U.S.C. § 1738 (1970). *See pp.* 5-6 *supra*.

[22] This is by operation of certain legal presumptions which are accorded foreign judgments under full faith and credit. These principles are fully discussed in subparagraph "b" at pp. 19-20 *supra*.

waive his constitutional right to issuance of citation, service of process, and an opportunity to be heard prior to rendition of the judgment against him.

Respondent respectfully submits that based upon the foregoing, as of the trial date of this cause, Petitioner could not as a matter of law assert any defense which went to the merits of the cause upon which Respondent obtained judgment in Ohio on November 30, 1967. Under the law of the State of Ohio, Petitioner's allegations of "fraud" in connection with Respondent's obtaining judgment have long since been held to be of an intrinsic nature and not sufficient to provide Petitioner with a defense in the State of Ohio under the provisions of the Ohio Revised Code sections 2325.01(D), and 2325.10.[23] *Saulpaugh v. Born*, 22 Ohio App. 275 154 N.E. 166 (1925). In addition, under the law of the State of Texas the "fraud" as alleged by Petitioner, if fraud at all, as a matter of law would constitute intrinsic fraud, and as such is insufficient to provide a defense to an action upon any judgment. *Crouch v. McGaw*, 134 Tex. 633, 138 S.W.2d 94 (1940); *accord*, *United States v. Throckmorton*, 98 U.S. 61 (1878); *Midessa Television Co. v. Motion Pictures for Television*, 290 F.2d 203 (5th Cir.), *cert. denied*, 368 U.S. 827 (1961).

(c) *At the Trial of this Cause*: At the trial Respondent introduced, and had accepted without objection, an exemplified copy of the Ohio judgment, upon which it brought suit in the State of Texas (S.F. 15-16; Plf. Exh. 2), that complied in all respects with the requirements of 28 U.S.C. § 1728 (1970).[24]

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[23] Ohio Rev. Code Ann. §§ 2325.01(D), 2325.10 (1954). *See* pp. 6-8 *supra*.

[24] *See* pp. 5-6 *supra*.

The courts of the State of Texas and of the United States of America have consistently held that upon a plaintiff's introduction of a properly authenticated copy of a foreign judgment being sued upon, a prima facie case for enforcement of such judgment is created. *Garman v. Reynolds*, 248 S.W.2d 262 (Tex. Civ. App. — Fort Worth 1955, writ ref'd), and the cases cited therein. Further, the introduction into evidence of such a properly exemplified copy of a foreign judgment does, as a matter of law, raise the following legal presumptions:

i. The jurisdiction of the rendering court will be presumed, and all prior requisites to the rendition of a valid judgment will be presumed to have been fulfilled, unless disproved by extrinsic evidence, or by the record itself. *Adam v. Saenger*, 303 U.S. 59 (1938); *accord, Paschall v. Geib*, 405 S.W.2d 385 (Tex. Civ. App. — Dallas 1966, writ ref'd. n.r.e.);

ii. A foreign judgment is presumed to be in full force and unsatisfied until proof to the contrary is made by the Defendant. *Gard v. Gard*, 144 S.W.2d 884 (Tex. Civ. App. — El Paso 1951, no writ); *accord, Ryan v. City Nat'l Bank & Trust Co.*, 186 S.W.2d 747, 748 (Tex. Civ. App. — Eastland 1945, no writ), and the cases cited therein; and

iii. A foreign judgment is presumed to be entitled to full faith and credit under the laws of the State of Texas. *Country Clubs, Inc. v. Ward*, 461 S.W. 2d 651, 655 (Tex. Civ. App. — Dallas 1970, writ ref'd. n.r.e.); *accord, Paschall v. Geib*, 405 S.W. 2d 385, 386 (Tex. Civ. App. — Dallas, 1966 writ ref'd n.r.e.). Further, Texas Courts have consistently held that:

> Texas does not permit judgment obtained by 'confes-fession of judgment.' Nevertheless, a judgment by confession obtained upon a judgment note in a foreign

> state, recognizing such procedure, will be given full faith and credit in Texas under Article IV, Sec. 1 of the United States Constitution. . . .

Scott Paper Co. v. Johnson, 406 S.W. 2d 548, 549 (Tex. Civ. App. — Waco 1966, no writ).

Given the nature of the allegations contained in Petitioner's First Amended Original Petition (Tr. 7-16), and the foregoing clearly delineated legal presumptions, under the provisions of rule 94 of the Texas Rules of Civil Procedure it was mandatory that Petitioner herein plead every affirmative defense available to him at the trial of this cause. Under Texas law the failure to plead an affirmative defense as required by rule 94 effectuates, as a matter of law, a waiver of such defense. *Chapman v. Tyler Bank & Trust Co.* 396 S.W. 2d 143 (Tex. Civ. App. — Tyler 1965, writ ref'd n.r.e.). However, at no time during the trial of this cause did Petitioner plead a possible constitutional defense or the absence of his knowledgeable waiver of issuance of citation, service of process, and an opportunity to be heard prior to rendition of judgment in Ohio (Tr. 3-6), which waiver was specifically pled by Respondent (Tr. 7-16). Petitioner made no attempt to assert a constitutional defense or the absence of a knowledgeable waiver of issuance of service of process upon execution of the cognovit note at any time during the trial of this cause (S.F. 1-76). Further, Petitioner did not attempt to assert any similar defense in his motion for directed verdict (S.F. 79-83), which was overruled by the trial court. (S.F. 83). Respondent respectfully submits that if Petitioner did not as a matter of law waive any constitutional defense by his execution of the cognovit note as discussed in subparagraph "a" above, or if Petitioner did not as a matter of law preclude the assertion

of any such constitutional defense by his failure to exhaust the remedies available to him in Ohio within two years after notice of the Ohio judgment — when at all times material Petitioner was represented by counsel (S.F. 14; Df. Exh. 1) — as discussed in subparagraph "b" above; Petitioner *did* as a matter of law waive any such defenses by his failure to affirmatively plead or offer evidence in support of the defenses before, at, or during trial of this cause.

(*d*) *On Appeal of this Case*: Petitioner on appeal of this cause to the Texas Court of Civil Appeals at Beaumont for the first time asserted an affirmative defense to the effect that the foreign judgment, having been obtained by a confession of judgment, was in violation of Petitioner's fourteenth amendment rights and, therefore, not entitled to full faith and credit.[25] Before the Texas Court of Civil Apeals at Beaumont, Respondent urged that absent affirmative pleading or the introduction of evidence in support of the alleged violation of Petitioner's constitutional rights under the fourteenth amendment, the issue of the constitutionality of a judgment taken in a foreign jurisdiction upon a cognovit note was not properly before the court of civil appeals.[26] *See California Dep't. of Mental Hygiene v. Bank of Southwest Nat'l Ass'n*, 163 Tex. 314, 354 S.W.2d 576, 581 (1961); *accord*, *Brunson v. Brunson*, 372 S.W.2d 761, 764 (Tex. Civ. App. — Amarillo 1963, no writ); *Trice Prod. Co. v. Dutton Drilling Co.*, 333 S.W.2d 607, 616 (Tex. Civ. App. — Houston 1960, writ ref'd n.r.e.). The Texas Court of Civil

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[25] Brief of Appellant, point of error 4; Document 5 in the certified record of this cause.

[26] Brief of Appellee at 12 1. Document 6 in the certified record of this cause.

Appeals at Beaumont refused to entertain Petitioner's constitutional argument, as is evidenced by the absence of any reference to such alleged error in that court's opinion or its overruling of Petitioner's motion for rehearing.

In Petitioner's application to the Texas Supreme Court for writ of error, Petitioner, for the first time, raised as alleged error, the claim that he did not knowingly and intelligently waive his rights to notice under the fourteenth amendment. However, as previously presented in subparagraph "c" above, the question of Petitioner's unknowing, or nonintelligent, waiver was not presented during the trial of this cause, was not raised on appeal before the court of civil appeals, was not presented in Petitioner's motion for rehearing before the court of civil appeals,[27] and as a direct consequence thereof, pursuant to rule 469(c) of the Texas Rules of Civil Procedure, such question could not properly be considered by the Texas Supreme Court. *Wallace v. Scrogum*, 372 S.W.2d 941 (Tex. 1963); *accord*, *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798, 799 (1956), wherein the Court held:

> The point was not raised in the Trial Court, in Petitioner's Brief as Appellant in the Court of Civil Appeals, or in his Motion for Rehearing in that court. It is presented for the first time in this Court, and cannot, therefore, be considered.

Thus, Respondent respectfully submits that Petitioner's affirmative defense of a nonintelligent or unknowing waiver of his fourteenth amendment right of due process was never properly before either the Texas Court of Civil Appeals at Beaumont or

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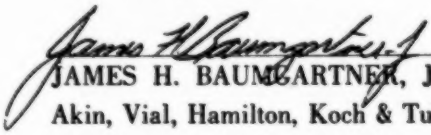
[27] Appellant's Motion for Rehearing, Point of Error 4; Document 9 of the certified record in this cause.

the Texas Supreme Court, for the reason that Petitioner waived the assertion of such a defense during the trial of this cause. Based upon the foregoing authorities, Petitioner cannot and should not now be heard to complain of his own lack of due diligence and his failure to consistently and continuously afford himself the benefit of, and adhere to, the substantive and procedural laws of both the State of Ohio and the State of Texas. Specifically, Petitioner did not attempt to cause the Ohio judgment to be vacated, though an adequate remedy was available under Ohio law, and Petitioner did not attempt to assert his alleged affirmative defenses in a proper manner before the Texas courts.

CONCLUSION

For the foregoing reasons Respondent respectfully submits that the petition for a writ of certiorari be denied.

Respectfully submitted,



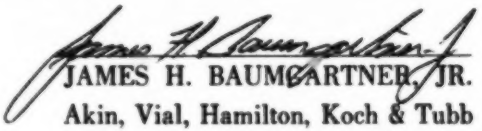
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1972, three copies of this Brief for Respondent in Opposition were mailed, first class postage prepaid, to Harold B. Berman, 2650 LTV Tower, 1525 Elm Street, Dallas, Texas 75201, Attorney for Petitioner.



JAMES H. BAUMGARTNER, JR.
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Dallas, Texas 75201

APPENDIX

NO. 69-3805-I

UNION COMMERCE BANK VS. D. W. SHAPS	IN THE 162nd JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 27th day of April, 1971, came on to be heard the above numbered and entitled cause wherein UNION COMMERCE BANK OF CLEVELAND, OHIO, is Plaintiff, and D. W. SHAPS is Defendent, and came the Plaintiff by and through its attorney of record, and came the Defendent in person and by and through his attorney of record, and announced ready for trial, and thereupon came a jury of twelve (12) good and lawful men and women, and the jury having been fully impaneled and sworn, said cause was tried before the Court and jury. At the conclusion of all testimony and evidence in chief, and after Plaintiff and Defendent had rested and closed, came the Plaintiff by and through its attorney of record and moved the Court to withdraw the cause from the jury, and for the Court to render a verdict in favor of the Plaintiff.

The Court, after hearing Plaintiff's Motion for a directed verdict, and after hearing the arguments of counsel for both Plaintiff and Defendent, was of the poinion that Plaintiff was entitled to Judgment as a matter of law, and found as follows:

1. That, it was uncontroverted that on January 13, 1965, Defendent borrowed the sum of $20,000.00 from Plaintiff, and that in connection with said transaction, Defendent executed a certain promissory note evidencing said indebtedness payable on demand in Cleveland, Cuyahoga County, Ohio, and that Defendent purchased stock in the Charles Corporation with said borrowed funds;

2. That Defendent defaulted on the payment of said note, and on November 30, 1967, Plaintiff obtained judgment against Defendent in Cause No. 853,166, during the September term, 1967, of the Court of Common Pleas of Cuyahoga County, Ohio, in the total sum of $17,899.23 plus interest at the rate of eight (8%) percent per annum until paid;

3. That the aforesaid judgment obtained in Cuyahoga County, Ohio, was regular on its face in all respects, and was obtained in its entirety pursuant to the laws of the State of Ohio as they existed on November 30, 1967; and

4. That as such, said judgment, absent sufficient evidence to create a question of fact with regard to the jurisdiction of the Court in Ohio being obtained by fraud, of which there was none, said judgment is entitled to full faith and credit in the State of Texas under Article 4, Sec. 1, of the Constitution of the United States of America.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff herein, UNION COMMERCE BANK OF CLEVELAND, OHIO, do have judgment against, and recover of and from Defendent, D. W. SHAPS, the total sum of $23,299.47, said sum being comprised of the amount of the judgment entered in Cleveland, Cuyahoga County, Ohio, on November 30, 1967, being $17,899.23 plus interest at the rate

of 8% per annum from the date hereof to date of judgment herein; that said Plaintiff further is entitled to recover of and from said Defendent interest on this judgment at the rate of eight (8%) percent per annum until fully paid, plus all costs of Court, for all of which let execution issue.

To which Judgment the Defendent duly excepted and gave notice of appeal.

SIGNED AND ENTERED this 14th day of May, 1971.

s/Dee Brown Walker

Judge, 162nd District Court
Dallas County, Texas

APPROVED AS TO FORM:

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